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IN THE

# Supreme Court of the United States

OCTOBER TERM 1955

NO. 261

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JAMES L. SWAFFORD
*Petitioner*

vs.

ATLANTIC COAST LINE RAILROAD COMPANY
*Respondent*

---

## ON PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF APPEALS, FIFTH CIRCUIT

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### STATEMENT OF THE CASE

The Court of Appeals reversed the judgment of the trial court on the ground that there was a complete absence of any showing of negligence on the part of the respondent Railroad, the record disclosing that the accident and death were occasioned solely by the negligence of the petitioner's deceased wife.

Petitioner makes only a partial and biased statement of the case. The opinion of the Court of Appeals gives a very clear, minute statement of the facts, which

is borne out by the record.[1] There is no dispute as to the condition of the crossing involved or its approach. The approach was not only marked with the usual railroad marking signs but the tracks themselves were clearly apparent to any one traveling in the direction in which the decedent approached. The right of way was 30 feet and there were no obstructions on it.[2] When 80 feet from the track the decedent had a clear view all the way down the track (R 67, 144, 145 and 157).

Mrs. Swafford had just previously passed over this crossing and had slowed down before doing so and was familiar with it. (R 111). As she approached the tracks on the trip in question she was traveling at a normal speed and slowed down when she was at a point where she could clearly see the train approaching from her right. Both engineer and fireman and a disinterested witness testified without dispute that after slowing down, her automobile darted ahead in front of the oncoming train, which was then entering the crossing, too late for the train crew to avoid the collision (R 150, 151, 164, 165 and 175).

Both the engineer and fireman in charge of the engine observed the decedent's automobile approach the crossing and saw it slow down as if to stop. The fire-

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1 220 F 2d, 901. See copy in Appendix to Petition for Writ of Certiorari.

2 See Defendant's Exhibits A, B, C, taken on December 31, 1952, the date following the accident (R-137), as identified by Appellee's witness Hardeson, (R-33) and Plaintiff's Exhibits 5 and 6, (identified R-16, 17) and received (R-19), as well as survey of the area by Plaintiff's Exhibit 14, identified (R-52 to 68), received (R-54). The crossing was clearly marked by standard railroad white flat board sign on Mrs. Swafford's approach and over 150 feet from crossing.
The road and track intersected at nearly right angles.

man continued to observe the automobile decreasing speed until the train was within 30 feet of the crossing, when it suddenly accelerated onto the tracks. Although the automobile became lost to the engineer's view when it was approximately 60 feet from the crossing and the engineer was unaware of the imminence of a collision he instinctively made a heavy service application of the brakes a second or so after the impact occurred. At the time it became apparent that Mrs. Swafford was not going to stop and accelerated it was then too late for any human or mechanical force to avoid the collision (R. 150, 151, 164 and 165).

All the witnesses to the accident testified that adequate and timely warning of the approach of the train was given. The train horn was blown loudly, clearly and continuously approximately 1700 feet or more before reaching the crossing with the bell on the train ringing automatically throughout the same distance (R 71, 86, 90, 94, 138, 139, 143, 145, 148, 149, 154, 155, 161, 162, 173, 174). The accident took place on a clear afternoon at 5:24 P. M. (R 9, 161).

It was on these facts that the lower appellate court concluded that the respondent Railroad was guilty of no negligence and that the collision was caused through the sole negligence of the decedent.

## ARGUMENT

As we view it, the sole question presented is:

Has the petitioner clearly demonstrated that the Court of Appeals decided an important question of Florida law in a manner in conflict with the decisions of the Supreme Court of Florida?

Petitioner, as in the court below, relies heavily upon the cases of *Atlantic Coast Line R. R. v. Pidd,* 196 F 2d, 163, and *Lowry v. Seaboard Air Line R. R. Co.* 171 F 2d, 625, both being decisions of the lower appellate court, and as the basis for writ of certiorari, attempts to assert that the lower court failed to follow these decisions. First, the conflict with these decisions is immaterial since the Court of Appeals was governed by and duty-bound to follow, as it rightfully did, the controlling Florida cases. *Erie R. Co. v. Tompkins,* 58 S Ct. 817, 304 U. S. 64. Second, it is clear from the opinion rendered below that the lower court was cognizant of its own decisions but found them inapplicable, saying:

> "The foregoing analysis of the situation at the time of impact, it seems to us, points out the essential distinctions between this case and the Atlantic Coast Line RR Co. v. Pidd, supra, and Lowry v. Seaboard Air Line R. R. Co., Supra." (See Petition — Appendix, page 5).

That the Court of Appeals adhered to and followed the controlling law of Florida is evident. After reciting facts the lower court stated:

> "Since the rule to be applied is a Florida rule, we have undertaken to find a statement of the underlying principles from the most recently decided Florida cases. We, therefore, quote from Martin v. Rivers, 72 So. 2d, 789. The court in the Rivers case quoted at length from Atlantic Coast Line Railroad Co. v. Timmons, 36 So. 2d, 430, 431."

and then after a detailed consideration of these principles as applied to the facts, concluded:

> "It being clear under the Florida law that the accident, resulting in the death of Mrs. Swafford, was attributable solely to her own negligence, the trial

court erred in refusing to direct a verdict for the defendant."

Petitioner's major contention appears to be that under the comparative negligence doctrine in Florida every railroad crossing accident case must be submitted to the jury and the appellate courts have no jurisdiction to review the evidence for the purpose of setting aside an adverse judgment when not supported by any showing of negligence on the part of the Railroad. This argument is clearly answered by the decisions of the Supreme Court of Florida, i. e. *St. Louis-San Francisco Railroad Company v. Earl,* 49 So. 2d. 325 (1951) where the court, after reviewing the evidence, held:

"The trial court was accordingly in error for refusing to direct a verdict for defendant and grant a new trial. His judgment is accordingly reversed.

To the same effect see:

*Loftin v. Bryan,* 63 S 2d, 310 (1953)

*Loftin v. Kibica,* 68 S 2d 390 (1953)

*Martin v. Rivers,* 72 S 2d 789 (1954)

*Atlantic Coast Line R. R. Co. v. Hill,* 76 S 2d, 861 (1955)

These current decisions clearly indicate notwithstanding the comparative negligence rule that the Supreme Court of Florida in each instance did not hesitate to examine the evidence and find it wanting to support the adverse verdict rendered by the jury.

**For the latest accord decision of the Florida Supreme Court see Loftin, et al. v. Nolin, 81 S 2d (Adv. Sheet) 200, decided June 15, 1955.**

Under the law of Florida it is clear that no duty devolved upon those in charge of the operation of the locomotive to slow down or stop unless and until they realized that the driver of a motor vehicle cannot or will not keep off the tracks in front of the approaching train and avoid the danger of collision therewith. See

*A. C. L. v. Miller,* 53 Fla. 246, 44 So. 247

*S. A. L. R. R. Co. v. Tomberlin,* 70 Fla. 435, 70 So. 437

*L & N R. R. Co. v. Harrison,* 78 Fla. 381, 83 So. 89.

*Dina v. S. A. L. R. R. Co.,* 90 Fla. 558, 106 So. 416

*Foster v. St. Louis San Francisco Ry. Co.* 75 F. Supp. 809, and others,

In *A. C. L. R. R. Co. v. Timmons,* 160 Fla. 754, 36 So. 2d, 430, Justice Terrell tersely summed up the whole body of the Florida law on this subject, viz:

> "The standard of prudence that one must observe in approaching a grade crossing is not uniform. Some jurisdictions require that one stop, look and listen, regardless of how clear the track is in either direction. Other courts require the traveler to look and listen, the duty to stop, depending on the circumstances revealed by looking and listening. Pekora v. Wabash Ry. Co., 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149, 91 A. L. R. 1049; Baltimore and Ohio R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645. We approve the latter rule in this State and when, as here, it is conclusively shown that the plaintiff did not look or listen, that there was no obstruction whatever to the vision, that the accident took place in a rural community where looking or listening would have

> avoided it, he is guilty of negligence which was the sole proximate cause of his injury and cannot recover."

which pronouncement was but the natural climax to cases like *Seaboard Air Line Railway Co. v. Myrick,* 91 Fla. 918, 109 So. 193; *Atlantic Coast Line Railroad Co. v. Miller,* supra; *Seaboard Air Line Ry. Co. v. Smith,* 53 Fla. 375, 43 So. 235; *Seaboard Air Line R. Co. v. Tomberlin,* supra; *Powell v. Gary,* 146 Fla. 334, 200 So. 854; *Garmak v. Florida East Coast Ry. Co.,* 95 Fla. 991, 117 So. 391; *Florida East Coast Ry. Co. v. Davis,* 96 Fla. 171, 117 So. 842; *Atlantic Coast Line R. Co. v. Watkins,* 97 Fla. 362, 121 So. 95; *Covington v. Seaboard Air Line Ry. Co.,* 99 Fla. 1102, 128 So. 426; *Bagdad Land & Lumber Co. v. Boyette,* 104 Fla. 699, 140 So. 798; *Powell v. Jackson Grain Co.,* 134 Fla. 596, 184 So. 492.

Petitioner lays great stress on the fact that the engine crew did not apply brakes until the accident occurred. As shown by the uncontroverted evidence, the decedent's car gave every appearance of stopping and yielding the right of way to the approaching train and it was only when she suddenly resumed her forward speed that any indication of a collision was given, then it was physically impossible for the crew to have taken any action to avoid the collision since at that time the train was less than a second away from the crossing. As the lower appellate court has previously recognized in *A. C. L. R. R. Co. v. King,* 196 F. 2d, 999:

> "If appellee's view that an engineer must apply the brakes as soon as he sees an automobile approaching a crossing, should prevail in law, trains could not run on schedule, or over crossings at more than a snail's pace. This is not the law."

Next, petitioner cites the speed of the train (63 to 65 miles per hour) as a ground for reversing the lower court; however, it is held that speed alone is not negligence. See 44 Am. Jur., page 751, Railroads, Section 511; *Consumers Lumber & Veneer Co. v. A. C. L. R. R. CO.*, 117 F. 2d, 329; *Powell v. Gary*. 200 So. 854, 146 Fla. 334; *A. C. L. R. R. CO. v. Timmons*, supra.

The appellate court clearly held that the death of Mrs. Swafford was attributable solely to her own negligence and the respondent was guilty of no negligence, basing its ruling on the Florida Supreme Court decisions including *A. C. L. R. R. CO. v. Timmons*, supra, and *Martin v. Rivers*, 72 So. 2d, 789.

## CONCLUSION

The holding of the Court of Appeals did not depart from but followed the well settled law governing the issues here involved, and we respectfully submit that the petition for writ of certiorari should be in all respects denied.

*Respectfully submitted,*

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1955

## No. 261

JAMES L. SWAFFORD
*Petitioner*

vs.

ATLANTIC COAST LINE RAILROAD COMPANY
*Respondent*

## RESPONDENT'S PETITION FOR RE-HEARING ON GRANTING [illegible] CERTIORARI FROM THE COURT OF APPEALS, FIFTH CIRCUIT AND REVERSING JUDGMENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1955

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No. 261

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JAMES L. SWAFFORD

*Petitioner*

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

*Respondent*

---

## RESPONDENT'S PETITION FOR RE-HEARING ON GRANTING WRIT OF CERTIORARI FROM THE COURT OF APPEALS, FIFTH CIRCUIT AND REVERSING JUDGMENT

---

## PETITION FOR REHEARING

The Respondent, Atlantic Coast Line Railroad Company, being aggrieved by Order of this Court dated October 10, 1955, in appendix, granting Certiorari and reversing judgment of the United States Court of Appeals for the Fifth Circuit, files its petition for rehearing, and as grounds therefor asserts that the decision of this Court reversing judgment of said Court of Appeals:

(a) Is contrary to and in irreconcilable conflict with the decisions, both prior and subsequent to the decision of said Court of Appeals, of the Supreme Court of the State of Florida and the laws and statutes of said

State, which, under the doctrine and decision of *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, are the controlling laws of this case;

(b) Is in conflict with previous decisions of said Court of Appeals and of this Court;

(c) Assumes, incorrectly, that the questions propounded by the Petitioner are based upon and borne out by the evidence in the cause, whereas same are misleading and inaccurate;

(d) Is a decision on the merits of said cause without having afforded the respondent an opportunity to be heard thereon, to present the facts of the case, or to have its day in Court, contrary to all rules and common justice;

(e) Creates a different set of standards as to substantive law of Florida in the federal courts of Florida than in the state courts of said State.

## ARGUMENT

The opinion of the Court of Appeals (R-225) conformed to and followed completely the state statutes and decisions. It does not relieve the railroad of liability for its negligence, even where accompanied by contributory negligence of the claimant, but holds that where there is no negligence on the part of the railroad, it not being an insurer, it cannot be held liable for the sole negligence of the plaintiff.

As the Court of Appeals' opinion stated:

> "It being clear under the Florida law that the accident, resulting in the death of Mrs. Swafford, was attributable solely to her own negligence, the trial court erred in refusing to direct a verdict for the defendant." (Petition for Writ. App. 10).

The Florida Court has spoken in support of the Railroad's contention in this case a number of times. Looking at the cases in chronological order, we refer the Court first to *Florida East Coast Ry. Co. v. Davis* (1928) 117 So. 842, 96 Fla. 171, followed in (1930) by *Relda Aparts. Inc. v. Atlantic Ins. Co.*, 129 So. 888, 100 Fla. 753, wherein the Court stated that damages cannot be recovered against railroad where the injury was caused by negligence of the injured party in approaching grade crossings without looking for approaching train.

*Florida East Coast Railway Co. v. Townsend,* (1932) 104 Fla. 362, 140 So. 196, deals with an obstructed crossing. In that case the defendant was charged with carelessly and negligently running a train against an automobile operated by Mr. Townsend over a public crossing about one-half mile south of the village of Orange Mills. The plaintiff recovered a judgment awarding $18,000 damages, and the defendant appealed. It appeared in the case that at about 4:30 or 5:00 p.m., the automobile in which plaintiff and a companion were riding approached the railroad crossing at a point where bushes, more or less, obstructed the view of the railroad track if not also a view of an approaching train.

The court in its opinion held that it was the duty of plaintiffs at least to attentively and cautiously look and listen for trains and to have the automobile under full control at appropriate speed as the known and obvious railroad track was approached. It was held that plaintiff was negligent as a matter of law and that the alleged negligence of the railroad was not clearly established; therefore, the court reversed the judgment for plaintiff for a new trial. The Court pointed out that there was substantial evidence that due warning was not given by whistle and bell of the approaching train. We

submit that a fair inference from the court's language in the *Townsend* case is that proof of due and adequate warning of the approach of the train would have required outright reversal of the plaintiff's judgment.

The case of *Anderson v. Crawford,* (1933) 111 Fla. 381, 149 So. 656, turned upon the admissibility of a local ordinance which had not been alleged in plaintiff's complaint but which had in fact been violated by defendant's engineer; however, in the body of the opinion we find the following language:

> "* * * It is true that, if the plaintiff saw the approaching train, or by the exercise of due care could have seen it as it approached, but in careless disregard of his own life drove his automobile upon the track in front of the train, he should not be allowed to recover damages for injuries sustained."

Although the language quoted in the *Anderson* case cannot be considered an actual holding by the Court, it is of value in that it indicates that the Court continued firm in the proposition that motorists who dash headlong in front of railroad trains are solely responsible for their own injuries and are precluded from recovery of damages from the railroad.

*Powell v. Gary,* (1941) 146 Fla. 334, 200 So. 854, is an *a fortiori* case in every respect and we contend that the enunciations of the Florida Court in that case are controlling and require outright affirmance of the Court of Appeals in the case at bar. The *Powell* case had to do with damages claimed to have resulted from a collision between a train and the plaintiff's truck on a crossing in the village of Oak, Florida. There was a verdict and judgment for plaintiff and the railroad appealed.

The railroad's testimony in the *Powell* case as to the speed of the train was that it was running 60 miles per hour. One witness for plaintiff estimated the train's speed at 80 miles per hour. Dealing first with warning signals, the Court pointed out that several witnesses for the railroad testified affirmatively and positively that warning blasts of the whistle were given and also that the engine bell was ringing. The Court further pointed out that the testimony of plaintiff's witnesses was entirely negative—that they did not hear the whistle blowing or the bell ringing. The Court quoted from *Seaboard Air Line R. Co. v. Myrick,* (1926) 91 Fla. 918, 109 So. 193, 195, to the effect that it is not sufficient for the injured plaintiff to say that he "did not see" the approaching train nor hear any whistle or bell or noise of its approach in order to overcome positive testimony that all ordinary warnings were in fact given of the train's approach. The opinion then states that the jury should not have arbitrarily disregarded the railroad's evidence with respect to signals and place the blame for injury on the railroad, especially in view of the strong evidence of the negligence of plaintiff's truck driver.

The Court held in the *Powell* case that it was as much the driver's duty to ascertain if a train was approaching from the south as it was the duty of the railroad company to cause warnings by appropriate signals to be given of an approaching train operated by it. The Court also stated that the evidence showed that the railroad company had in fact given warning signals as the train approached the crossing. From that point, the Court went on to hold that the accident was caused solely by the driver's negligence and that there could be no recovery. The pertinent language from the opinion reads:

"* * * It also is apparent from the driver's testimony that he failed to exercise ordinary care and prudence to ascertain whether or not a train was approaching before driving his truck upon the railroad track, and that he could have seen the train if he had looked. If the damage alleged was proximately caused solely by the negligence of the plaintiff or his agent driving the truck, there can be no recovery. The mere rapid speed of the train would not alter this well-settled rule of law. See Atlantic Coast Line R. Co. v. Gornto, 89 Fla. 97, 103 So. 117; Covington v. Seaboard Air Line R. Co., supra; Powell v. Jackson Grain Co., supra. See also notes in 56 A. L. R. 647."

The Court reversed the judgment in *Powell v. Gary, supra,* dealing with evidence of speed of 60 to 80 miles per hour through a village.

In the instant case, *every* witness to the accident testified that adequate and timely warning of the approach of the train to the unobstructed crossing was given.

The Petitioner (plaintiff below) produced two witnesses to the accident. The first, John Arthur Johnson (R-71) said he heard the train blowing and looked up. The second, Arthur Douglas, (R-86) testified that he looked up when the "train blowed" . . . "along in there by the water tank" (R-90); that the horn on the train was the first thing he heard (R-93), it was blowing *loud* and *steady* and blowing all the distance from the water tank (a distance of 1700-1800 feet from the crossing (R-149, 155)) to the crossing where the accident happened (R-93, 94).

Petitioner did not produce any other witnesses to the accident. The Petitioner did not even produce any negative testimony.

Respondent Railroad produced the following witnesses, each of whom testified positively that the horn on the train was blown, loudly and steadily, as it approached the crossing:

1. Eddie Green (R-138, 139), who was standing with Arthur Douglas, appellee's witness, supra.

2. Eddie Alexander (R-143, 145), who was about 80 to 100 feet west of the crossing, in his house and heard the whistle blowing for some time.

3. John McKeever (R-173, 174) who was south of the crossing hunting rabbits, when he heard the train blowing, looked up beyond the crossing and saw the train back by the water tank (1700-1800 feet from the crossing (R-149, 155)), and heard it continue to blow right on up to the crossing.

4. Clinton C. Hamil, fireman on train, (R-148, 149, 154, 155) who testified that both the horn and bell were blown for crossing, beginning *before* train reached whistle post, 1500 feet west of the crossing and spaced throughout that distance on up to the crossing.

5. J. M. Watkins, engineer of train, (R-161, 162, 163), who testified the horn on the train was blown by him for over 1500 feet and up to the crossing, with the bell on the train ringing automatically throughout the same distance.

Thus, the *undisputed* evidence is that, the horn on the train was blown loudly, clearly and continuously for approximately 1700 feet or more approaching this crossing on a straight, level track.

There was no dispute on the condition of this crossing or its approach.* The deceased wife had a clear view of the crossing and of the approaching train *when she was 80 feet from the tracks.* On the wife's right (from which the train approached) she passed a store, a cabbage palm next to the store and then, *80 feet from the tracks, her view was wide open all the way down the track,* (R-67, 144, 145, 157). The weather was clear —it was day light, about 5:30 P.M., (R-9, 161) and there was no evidence of any impairment of hearing or sight of Mrs. Swafford.

There is likewise no dispute, as we see the evidence, that Mrs. Swafford saw and heard the train, or that she *at least* gave the obvious appearance of seeing and hearing the train and stopping for the train. Other than the engineer and fireman of the train, two outside witnesses saw and heard both the car and the train *before* the accident.

One, was Petitioner's witness, Arthur Douglas (R-86-95), who saw the car when it was about 100 feet from the track, (R-91, 94). Douglas was some 450 feet Northwest of the crossing. He had heard and seen the train coming out of the East, (the horn on the train blowing), pass him and go down to the crossing, and he saw the car about 100 feet from the crossing when the train was about 200 feet from the crossing. During all the time, as shown above, the train horn had been

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*See Defendant's Exhibits A, B, C taken on December 31, 1952, the date following the accident (R-137), as identified by Appellee's witness Hardeson, (R-33) and Plaintiff's Exhibits 5 and 6, (identified R-16, 17) and received (R-19), as well as survey of the area by Plaintiff's Exhibit 14, identified (R-52 to 68), received (R-54). The crossing was clearly marked by standard railroad white flat board sign on Mrs. Swafford's approach and over 150 feet from crossing. The road and track intersect at nearly right angles.

blowing loudly. Then the train cut off his view of the car and the crossing, as the train went in front of him, (R-93, 94).

The other, Rabbit John McKeever, (R-172-183) saw the car before it got to the store, (over 100 feet from the crossing) and that as the car was about one-half the distance between the store and the tracks, *it slowed down,* giving every appearance of stopping, then, as McKeever stated: "She took off again just like it might be she say, 'Well, I can make it' and they go ahead. The next thing I hear, 'boom' and it was all over." (R-175). Thus, from the standpoint of the outside witnesses we have not only clear, loud, continuous and adequate warning of the approach of the train, (McKeever R-173, 174 and witnesses, *supra*) but an apparent observance of the signals and response of the driver of the car in slowing down to stop.

The engineer (R-161, 163) and fireman (R-148, 151) testified, as aforesaid, to the giving of signals of the approach of the train, and during the giving thereof, observed the car of the decedent when the train was some 200 feet of the crossing and the car about half of that distance, and with the car slowing down to stop. As the fireman said: "Well, at that time I took it the car was going to stop and the horn was blowing, the bell ringing. We were approaching the crossing and the next thing I knew the car had darted right in front of the engine. (R-150, 151). The engineer automatically put the brakes in full service application and I'd say approximately a second or two seconds had occurred at the time." (R-153). The car had been proceeding at a moderate rate of speed (R-175), decreasing speed and the front end bobbing down to stop (R-150)—until train was within 30 feet of crossing (R-151)—then "Boom" . . . —"she took off again * * *" (R-175, 151).

The engineer corroborated the fireman's testimony and added that the car was bobbing down—it appeared to be slowing down — when he lost view because of curve of the dash and his position on the opposite side of the diesel unit (R-164). The front end of the engine was then approximately 60 feet from the crossing. It was then too late for any human or mechanical force to avoid the inevitable collision. The engineer was unaware of the imminence of a collision until he felt the impact, at which time he made a heavy service application of the brakes (R-165).

Plaintiff Petitioner, in the face of these facts called as one of his witnesses, George Lynch, Assistant to the General Superintendent of Motor Power and Equipment of the Appellant railroad in an attempt to make some issue of negligence for the jury. The witness identified speed tape of this train at time of impact to be 63 m.p.h. (R-98, 99). The engineer and fireman estimated the speed between 60-65 m.p.h. (R-147, 161). Outside witnesses, *supra,* merely said it was going fast.

Admittedly the brakes were not applied until the impact occurred (R-164, 165) and this being a passenger train (R-161, 147) a heavy service application of the brakes was made rather than an emergency application (R-161, 165). Appellant makes much ado about the stop and the distance of some 3,060 feet traveled after the impact, with the train *then* located in the City Limits of Sarasota, (R-189) but this is *all* after the impact and death had occurred. The point of impact was over 2,900 feet outside any municipal limits.

The factual situation developed, with little or no conflict, is that the train approached the crossing at a speed of approximately 63 m.p.h. on a clear day, sound-

ing horn and bell continuously from some 1700 feet up to the crossing, with the engineer and fireman maintaining a constant look out, and the wife approaching at a slow rate of speed, with unlimited view 80 feet from the crossing, commencing to stop about 50 feet from the crossing and then darting suddenly in front of the train which was then entering the crossing and too late for the crew to have avoided the collision.

There was no issue of negligence for submission to the jury. Respondent railroad was entitled as a matter of law to a verdict of not guilty.

The *Powell v. Gary* case, *supra,* was cited with approval by the Florida Supreme Court in *Martin v. Rivers,* 72 So. (2) 789 in which verdict for plaintiff was reversed with directions to enter judgment for the railroad. As the Court stated:

> "The fireman had the right, from the facts in the record here, to believe that the deceased was in possession of his faculties and his normal senses, and that with all of the signals of danger, the extent of which were almost overwhelming, he would not walk directly into the path of a moving train. When the fireman finally realized that the deceased was not going to stop and was not going to heed every danger signal possible to give, it was too late for any human agency to extricate the deceased from the situation that he placed himself in or prevent the death which so unfortunately occurred."

Worthy of more than mere passing note is Petitioner's Counsel's opening statement to the jury, wherein he noted the essentials to his recovery and averred he would show "the train was going at a very fast rate of speed through a settled section . . . . . *that there was*

*a peremptory signal, the blowing of the horn* . . . . but that the tremendous speed in excess of 65 miles per hour was the principal cause of the accident." (R-7).

Not only was there no showing of a "tremendous speed in excess of 65 m.p.h., but there was a positive contradiction of the peremptory signal." It was definitely and clearly established that the horn was blown loud and clear for 1700 feet and had been and was being thus blown as the car approached with clear, unlimited view for 80 feet. The plaintiff Petitioner not only failed to carry the burden of proof but the evidence overwhelmingly established adequate signals and warnings of the approaching train and that Mrs. Swafford either neglected to see or hear what she could have seen and heard (which seeing and hearing she must do at a place where she can see and hear) or doing so, decided to go ahead, spurted out in front of the train and the accident happened.

From the decisions of the Supreme Court of Florida it is clear that no duty devolved upon those in charge of the operation by the locomotive to slow down or stop unless and until they realized that the driver of a motor vehicle cannot or will not keep off the tracks in front of the approaching train and avoid the danger of collision therewith. See *A.C.L. v. Miller,* 53 Fla. 246, 44 So. 247, *S.A.L.R. Co. vs. Tomberlin,* 70 Fla. 435, 70 So. 437, *L. & N. R. Co. v. Harrison,* 78 Fla. 381, 83 So. 89, *Dina v. S.A.L.R. Co.,* 90 Fla. 558, 106 So. 416, *Foster v. St. Louis San Francisco Ry. Co.,* 75 F. Supp. 809 and others.

The Supreme Court of Florida reaffirmed its adherence to these principles in *Loftin v. Wilson,* (Fla. 1953), 67 So. (2) 185, 191, where the Court stated:

"On the other hand, liability of the railroad company is not clearly shown. Those in charge of the train had a right to assume that the truck driver would stop a safe distance from the crossing. When they were apprised to the contrary, they were faced with an emergency brought about through no fault of their own."

As the lower Appellate Court has recognized in *ACL RR Co. v. King,* 196 F. 2d 999:

"If appellee's view that an engineer must apply the brakes *as soon as he sees an automobile approaching a crossing,* should prevail in law, trains could not run on schedule, or over crossings at more than a snail's pace. This is not the law."

*Speed alone is not negligence.* It in no manner can be construed as the proximate cause of this accident. No speed restriction was involved in this cause.

It is stated in *44 Am. Jur., Page 751, Railroads,* Section 511:

"In the absence of legislation, no rate of speed of a railroad train approaching a crossing is, of itself, negligent. The very purpose of locomotion by railways is the accomplishment of a high rate of speed in the movement of passengers and freight, and this the law authorized. To require railroads generally so to reduce their speeds at all grade crossings as to avoid collisions with persons who may, carelessly or accidentally, be upon the crossing when a train is approaching would defeat to a great extent, the purpose of the existence of railroads. *Outside of city limits, any speed is legitimate for a railroad train which is consistent with the safety of the train and passengers,* and under ordinary circumstances the running of a train at a high rate of speed over a city crossing is not always negligence, as where it appears that such crossing is

not frequently used, or that the train passed at an early hour when few people might be expected to be about. *Nor is the fact that a particular highway is constantly traveled by a great number of persons sufficient to render the question of negligence in running a train oper it at high speed one for the jury, where the statutory signals were given upon approaching it,* and there is nothing to show that the number of travelers was sufficient to impede progress, or otherwise make the crossing difficult and dangerous. *Consequently, when a railroad takes all necessary precautions, and gives proper warnings to prevent strangers from being injured at crossings, it seems that a recovery cannot be based on the speed of the train."* See also *154 ALR 235 and 253.*

Most recently in *Loftin v. Nolin* (June 15, 1955), 81 So. 2d 200 (Adv. Sheet), the Florida Court reiterated the principles here involved stating:

"On the other hand, it appears from this record the accident was due to the negligence of the deceased. Under F. S. §768.06, F.S.A., no recovery can be had because of his death when the sole cause was his own negligence. It is true that F. S. §768.05, F.S.A., makes the railroad company liable for the damage done unless the railroad company makes it appear that their agents have exercised all ordinary and reasonable care and diligence. In this case, it appears from the record that the railroad company and its agents exercised all ordinary and reasonable care and diligence and such being the case there is no presumption against the railroad company. . . .

"In the case of Florida East Coast Railway Co. v. Townsend, 104 Fla. 362, 140 So. 196, 143 So. 445, this court held it was the duty of the plaintiffs at least to attentively and closely look and listen for trains and to have the automobile under full control at an appropriate speed. See also Anderson v.

Crawford, 111 Fla. 381, 149 So. 656; Powell v. Gary, 146 Fla. 334, 200 So. 854.

"In the case of Van Allen v. Atlantic Coast Line R. Co., 109 F.2d 780, the United States Circuit Court of Appeals for the Fifth Circuit held that the driver drove onto the tracks and into a collision with the train without looking or listening or slackening his speed. In that case the United States Circuit Court of Appeals pointed out that this Court has repeatedly held that the action of a driver in going onto the tracks without stopping, looking, or making any effort whatever to ascertain whether a train is approaching, is in law the sole proximate cause of the injury and bars recovery.

"From the record in this case the undisputed facts show that the unfortunate accident was caused by the negligence of the decedent and such negligence was the sole proximate cause. At the conclusion of all the testimony, the Court should have granted the motion of appellants for an instructed verdict."

In addition to the Florida cases which have been cited above, the 1940 decision of the Court of Appeals for the Fifth Circuit in *Van Allen v. Atlantic Coast Line R. Co.*, 109 F. (2) 780, also supports the instant case. In that case the driver drove onto the tracks and into collision with the train without looking or listening or slackening his speed. The Court of Appeals said:

"Thus, the record affirmatively acquits defendants of negligence in the matter of signals, there being positive evidence that signals were given, and only the negative evidence of the two in the car, that they did not see or hear the train approaching, that they did not hear any signals.

"Such evidence will not make an issue in Florida against the positive testimony that the signals were given. Florida East Coast R. Co. v. Davis, 96 Fla.

171, 117 So. 842; Southern R. Co. v. Mann, 91 Fla. 948, 108 So. 889; Seaboard Air Line R. Co. v. Myrick, 91 Fla. 918, 109 So. 193.

"* * * Upon the undisputed evidence, the proximate cause was the driving on to the tracks without stopping, looking, or making any effort whatever, to ascertain whether a train was approaching. The Supreme Court of Florida has in repeated decisions held that such conduct is the sole proximate cause of an injury, barring recovery alike of driver and guest. Germak v. Florida East Coast R. Co., 95 Fla. 991, 117 So. 391; Seaboard v. Watson, 94 Fla. 571, 113 So. 716; Covington v. Seaboard Air Line R. Co. 99 Fla. 1102, 128 So. 426; Atlantic Coast Line R. R. Co. v. Miller, 53 Fla. 246, 44 So. 247; Louisville & N. R. Co. v. Padgett, 71 Fla. 90, 70 So. 998."

The Fifth Circuit Court of Appeals in *Consumers Lumber & Veneer Co. v. Atlantic Coast Line R. R. Co.*, 117 F. 2d 329, said:

"* * * It is true enough that a speed of 65, 70 or even 80 miles an hour, the speed at which the truck driver testified the engineer said he was going, is not unlawful and that the mere fact that the train was run at that speed is not of itself sufficient evidence of negligence to base a verdict on."

The Florida Court and the Court of Appeals for the Fifth Circuit, applying the substantive law of Florida both are in agreement that mere speed (if we assume a speed of 63 m.p.h. to be speed) alone is not negligence and that if adequate and timely warning of the approach of the train is given that the Railroad cannot be held liable for the negligence of the driver of a car in failing to respond to and obey such warning signals.

We submit that the record affirmatively acquits the railroad of any negligence proximately causing or contributing to the accident and shows the accident to have resulted solely from the negligence of Petitioner's decedent. The evidence cannot support a verdict for plaintiff and, accordingly, required final judgment for the Respondent Railroad in accordance with the law and decisions of the State of Florida, of the Court of Appeals for the Fifth Circuit, and an elemental application of the doctrine of proximate cause.

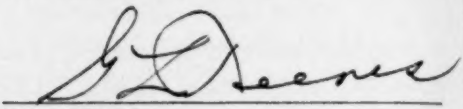
In this state of the record, it seems patent that the questions propounded in the Petition for Writ of Certiorari are misleading and inaccurate, and that this Honorable Court has been misguided into a decision wholly out of accord with the applicable law and without ever affording Respondent an opportunity to be heard.

Otherwise, this Court is endorsing a set of double standards: one for the federal courts in Florida, and another for the state courts in the application of the substantive law of Florida.

## CONCLUSION AND PRAYER

It is, therefore, respectfully prayed that rehearing will be granted and that this Court will thereupon correct said error by dismissal of the writ, denial of Certiorari here or in the alternative that the said order of this Court of October 10, 1955 be modified to permit the case to be assigned for argument.

*Respectfully submitted,*



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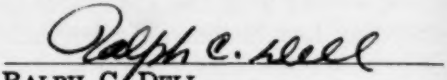

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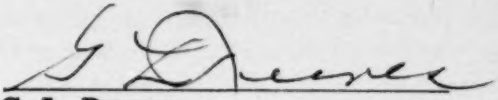
## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay and is in compliance with Rule 58 (1) of the Rules of this Court.



G. L. REEVES

## APPENDIX

Order of October 10, 1955, omitting caption:

"PER CURIAM: The petition for writ of certiorari in this case is granted and the judgment is reversed. Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan are of the opinion that certiorari should not have been granted in this case."